BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9543
File: 20-540449; Reg: 15082119

7-ELEVEN, INC. and SES VENTURES, INC.,
dba 7-Eleven Store 36453A
2161 East El Segundo Boulevard, Suite D,
El Segundo, CA 90245-4503,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 5, 2016
Los Angeles, CA

ISSUED JUNE 3, 2016

Appearances: *Appellants:* Jennifer Oden, of Solomon Saltsman & Jamieson, as counsel for appellants 7-Eleven, Inc. and SES Ventures, Inc. *Respondent:* Jonathan Nguyen and Jacob Rambo, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and SES Ventures, Inc., doing business as 7-Eleven Store 36453A, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 8, 2014. On

[1]The decision of the Department, dated September 18, 2015, is set forth in the appendix.

March 16, 2015, the Department filed an accusation against appellants charging that, on November 7, 2014, appellants' clerk, Dulce Puebla Romero (the clerk), sold an alcoholic beverage to 18-year-old Michael Drohan. Although not noted in the accusation, Drohan was working as a minor decoy with the El Segundo Police Department and Department of Alcoholic Beverage Control at the time.

Before the hearing, appellants filed a Motion to Compel Discovery pursuant to Government Code section 11507.6, seeking the contact information for the decoy. On April 6, 2015, the Department replied to the discovery request and provided the address of the El Segundo Police Department for contacting the decoy. On April 13, 2015, appellants sent a letter to the Department asking to meet and confer on the basis that the Department's discovery response was incomplete, specifically requesting the decoy's telephone number and home address. The Department replied on April 14, 2015, explaining that pursuant to *Mauri Restaurant Group* (1999) AB-7276, providing the address of the law enforcement agency under which the decoy acted complies with Government Code section 11507.6. (*Id*. at p. 8.) Appellants filed a Motion to Compel Discovery (Exh. A) on April 21, 2015, and the Department filed its opposition. (Exh. 2.) Oral argument was heard telephonically on May 18, 2015, and the motion was denied by the administrative law judge (ALJ). No written order was prepared.

At the administrative hearing held on July 9, 2015, documentary evidence was received and testimony concerning the sale was presented by Drohan (the decoy) and by Thomas Jones, an El Segundo Police officer. Appellants presented no witnesses.

Testimony established that on the date of the operation the decoy entered the licensed premises alone, followed a few seconds later by Officer Jones. The decoy went to the cooler and selected a six-pack of Bud Light beer in bottles. He took the

beer to the register and put it on the counter. The clerk asked to see his identification, and the decoy handed her his California driver's license — which had a vertical orientation and contained a red stripe stating "AGE 21 IN 2017." (Exh. 3.) The clerk looked at the ID for a few seconds, returned it to the decoy, then completed the sale without asking any age-related questions.

The decoy exited the store and joined Detective Ryan Danowitz in his car. The detective asked him to write out a statement describing the incident. Inside the store, Officer Jones contacted the clerk, identified himself, and explained the violation that had occurred. There were other customers in the store, so Officer Jones escorted the clerk outside where they were joined by Detective Danowitz and the decoy.

Officer Jones asked the decoy who had sold him the beer. The decoy pointed at the clerk and said "she did." The decoy and clerk were facing each other and standing about four feet apart at the time. A photo of the two of them was taken (Exh. 4) and the clerk was issued a citation.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed a timely appeal contending: (1) the ALJ abused his discretion by denying appellants' motion to compel disclosure of the decoy's actual address; (2) the Department failed to proceed in the manner required by law by omitting and failing to analyze the characteristics of the decoy argued in appellants' 141(b)(2)[2] defense; and (3) the face-to-face identification of the clerk did not comply with rule141(b)(5).

[2]References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

DISCUSSION

I

Appellants contend the ALJ abused his discretion by denying appellants' motion to compel disclosure of the decoy's actual address. (App.Br. at p. 8.)

Government Code section 11507.6 provides in pertinent part:

> After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after the service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party . . .

Appellants maintain section 11507.6 entitles them to the decoy's *personal* address and phone number. In response to appellant's motion, the Department supplied the address and phone number for the El Segundo Police Department — the law enforcement agency that conducted the decoy operation.

The Department maintains section 11507.6 only entitles appellants to *an* address — that the statute does not compel disclosure of a residential address. (Reply Br. at p. 6.) They argue that since the decoy was employed by the El Segundo Police Department, and that, in his role as decoy, he was an agent of the police, it was reasonable to supply only the police department's contact information. (*Ibid.*) Furthermore, they argue, since peace officers' home addresses are protected from disclosure, it follows that the decoy's information — as an agent of the police — should be protected as well. (*Id* at p. 7, citing Penal Code §§ 1328, 1328.5.) Finally, the Department maintains disclosure of the decoy's home address would violate Government Code section 6254, subdivision (f) which provides that witness' addresses be provided "unless the disclosure would endanger the safety of a witness or other

person involved in the investigation." (*Id*. at p. 9, citing Gov. Code § 6254(f).) The Department maintains the safety of the decoy requires that his or her personal address not be disclosed because such disclosure would "set a dangerous precedent of requiring the Department to provide the same information when requested by any licensee." (*Id.* at p. 10.) We agree that disclosure of the decoy's home address might jeopardize the safety of the decoy, and expose him or her to danger or possible harassment.

Appellant maintains the plain language of section 11507.6 requires the Department to disclose the decoy's contact information "to the extent known" to the Department. And that, since the Department was in possession of the decoy's home address it should have been provided to appellants. (App.Br. at p. 9.) They allege they were unable to contact the decoy through the El Segundo Police Department, which hampered their ability to prepare a defense and that this prejudiced their case. (*Id*. at p. 11.)

The Department argues that it complied with the purpose of discovery when it supplied the police department's contact information, citing the following:

> The purposes of California's discovery statutes are well known. They are intended, among other things, to assist the parties and the trier of fact in ascertaining the truth; to encourage settlement by educating the parties as to the strengths of their claims and defenses; to expedite and facilitate preparation and trial; to prevent delay; and to safeguard against surprise. [Citation.]

(*Beverly Hospital v. Superior Court* (1993)19 Cal.App.4th 1289, 1294 [24 Cal.Rptr.2d 238].) They contend that by supplying the decoy's work address, plus three color photographs of the decoy (Exhs. 4, 5, 6) which were entered into evidence, appellants had sufficient information to prepare their defense and to make their 141(b)(2)

arguments at the hearing. It is the Department's position that appellants therefore were not prejudiced by not having the decoy's personal address and phone number. (Reply Br. at p. 8.) We agree.

Appellants have not shown how the refusal of the Department to provide the decoy's personal contact information prevented them from preparing a diligent and thorough investigation, or prevented them from preparing a response and defense to the accusation. The discovery required by Government Code section 11507.6 was provided and motion was properly denied by the ALJ. While appellants are entitled to an address for the decoy, they are not entitled to the decoy's home address.

Having said that, however, appellants *are* entitled to make a request to interview the decoy, and that request should be in writing and delivered to the law enforcement agency that conducted the decoy operation. In the event the law enforcement agency fails to forward such a written request to the decoy, this could present due process grounds for reversal. The facts in this matter, however, do not support a reversal. While the Board recognizes appellants' concerns over their inability to more fully investigate decoys prior to the administrative hearing, we are also mindful that the streamlined processes and discovery limitations of the APA are not helpful to appellants.

On a final note, appellants urge the Board to overrule its decision in *Mauri Restaurant Group*, *supra* — the case in which the Board held that providing the address of the law enforcement agency under which the decoy acted complied with Government Code section 11507.6. The Department maintains, however, "[t]he Board does not have the authority to overrule decisions in other cases." (Reply Br. at p. 8.) We are

perplexed as to what the Department means by this. At oral argument the Department's General Counsel rose to explain that this argument, referenced as it is to a "decision in another case" meant the "law of the case," and that, accordingly, all the Department was saying was this Board could not go back and reverse a final decision with respect to the parties to that dispute. That, of course, goes without saying; it is indisputable.

But to be perfectly clear, if this Board believed our decision on the law in *Mauri* or any other matter was no longer warranted, either because of changed law, circumstances or both, we have the authority to reconsider that decision; and have reversed past decisions for legal reasons explaining why we have done so. Whether our decisions are (indisputably) "persuasive authority" for the points of law explicated in a factual context, or (apparently disputable) "binding precedents" for the legal principles stated, the Board expects them to be followed and, when relevant, called to our attention in counsel's briefs. Failure of counsel to cite in their briefs to the Board's pertinent decisions will not assist them in argument. For the orderly and predictable resolution of appeals, this Board will continue to rely on its previous rulings unless a change in law is necessitated by extenuating changes in controlling law or circumstances. That goes for our decision in *Mauri*, which appellants have not persuaded us was legally wrong.

II

Appellants contend the Department failed to proceed in the manner required by law by omitting and failing to analyze the characteristics of the decoy argued in appellants' 141(b)(2) defense. Appellants maintain the decoy's experience and

Explorer training gave him confidence and a lack of nervousness which "affected his general appearance, which gave him the appearance of someone twenty one or older." (App.Br. at pp.14-15.) Further, they maintain the use of such an experienced decoy made the operation unfair. (*Id*. at p. 14.)

Rule 141(a) provides:

> A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

To that end, rule 141(b)(2) provides:

> The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

Rule 141 provides an affirmative defense, and the burden of proof lies with the party asserting it — here, appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for

> consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

In this case, the ALJ made the following factual findings concerning the decoy's overall appearance and experience:

> 5. Drohan appeared and testified at the hearing. On November 7, 2014 he was 5' 11" tall and weighed between 185 and 195 pounds. He was wearing a blue button-up shirt, khakis, and skateboard shoes. His hair was short and spiked using gel. He had a black Timex watch on his wrist. (Exhibits 4-6.) At the hearing he was two inches taller, he weighed 205 pounds, and he did not have any gel in his hair.
>
> [¶ . . . ¶]
>
> 11. Drohan was an Explorer on November 7, 2014, having joined the decoy program approximately four years earlier. As an Explorer he had been taught leadership and teamwork. He also learned how to direct traffic and how to train other people. Since December 2014 he has been employed by El Segundo P.D. as a police cadet. Drohan visited six locations on November 7, 2014; this was the only location which sold an alcoholic beverage to him.
>
> 12. Drohan appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Romero at the Licensed Premises on November 7, 2014, Drohan displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk.

(Findings of Fact ¶¶ 5, 11-12.)

These findings prompted the ALJ to reach the following conclusion regarding appellants' rule 141 defenses:

> 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2)[fn.] and 141(b)(5) and, therefore, the accusation should be dismissed pursuant to rule 141(c). With respect to rule 141(b)(2), the Respondents argued that Drohan's height and weight, coupled with his Explorer training, gave him the appearance of a person over the age of 21. The Respondents are incorrect. Drohan had a very youthful appearance consistent with his actual age, ore even a year or two younger. As set forth above, Drohan displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. (Finding of Fact ¶ 12.)

(Conclusions of Law, ¶ 5.)

Appellants maintain "[t]he ALJ made no reasonable attempt to consider Mr. Dorhan's prior decoy experience" and therefore he "analyzed the decoy's appearance in a vacuum." (App.Br. at p. 15.) As the Board has said many times:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. *There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.*

(*Azzam* (2001) AB-7631, at p. 5, emphasis added.)

Appellants offered no *evidence* that the decoy's experience *actually resulted* in him displaying the appearance of a person 21 years old or older in this case. Indeed, evidence of how the decoy appeared from the clerk's perspective would be nearly impossible to ascertain since the clerk did not testify at the administrative hearing. In

the end, all the Board is left with is a difference of opinion — appellants' versus that of the ALJ — as to the conclusion that the evidence supports. Without more, this is simply an insufficient basis upon which to overturn the determination by the ALJ. The ALJ, as the trier of fact, has the best opportunity to observe the decoy as he testifies, and make the determination whether the decoy's appearance met the requirement of rule 141 that he possess the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages.

As the Board has explained:

> [T]his Board is entitled to review whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. (Cal. Const. art. XX, § 22; Bus. & Prof. Code. § 23084, subd. (c) and (d).) If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. This should not be read to require an explanation or analysis to bridge any sort of "gap"; typically, the evidence an appellant insists is essential and dispositive is either irrelevant or has no bearing whatsoever on the findings of fact. While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

(*Garfield Beach CVS, LLC/Longs Drug Stores, LLC* (2015) AB-9501, at pp. 5-6.) Nothing in this case suggests that these principles were violated, or that this decoy operation was in any way unfair.

In order to claim an unfairness defense under rule 141(a), appellants must put forth more than their opinion that the operation was unfair. The rule requires solid,

credible evidence that a reasonable person would have been influenced by certain facts to sell alcohol to a minor. It is not incumbent upon the Department to demonstrate compliance with the rule; rather, it is appellants' burden to establish the affirmative defense of rule 141 by showing that the rule was not complied with. Appellants have not done so here.

III

Appellants contend the face-to-face identification of the clerk did not comply with rule 141(b)(5) because the identification was made by the officer rather than the decoy. (App.Br. at p. 16.)

Rule 141(b)(5) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

This rule, as with 141(a) and 141(b)(2), provides an affirmative defense. The burden is, therefore, on appellants to show non-compliance. (*Chevron Stations, Inc.*, *supra*; *7-Eleven, Inc./Lo, supra*.) As appellants correctly point out, the rule requires "strict adherence." (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the clerk].) Notably, the plain language of the rule in no way forbids the officers to first make contact with the suspected seller.

In *Chun* (1999) AB-7287, cited by appellants, this Board observed:

> The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each

> other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.) In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where, as here, an officer initiates contact with the clerk following the sale:

> As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven,* Inc*./Morales* (*2014) AB-9312; 7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Keller*) (2003) 109 Cal.App.4th 1687 [3 Cal.Rptr.3d 339].) As the court noted:

> [S]ingle person show-ups are not inherently unfair. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].) While an unduly suggestive one-person show-up is impermissible (*ibid.*), in the context of a decoy buy operations [*sic*], there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

The *Keller* court concluded that "[t]he literal terms of [rule 141(b)(5)] leave the location of the identification to the discretion of the peace officer." (*Id.* at p. 1697.)

In *Carlos M.*, *supra*, the court said:

> The burden is on the defendant to demonstrate unfairness in the manner

> the show-up was conducted, i.e., to demonstrate that the circumstances were unduly suggestive. (*People v. Hunt* (1977) 19 Cal.3d 888, 893-894 [140 Cal.Rptr. 651, 568 P.2d 376].) Appellant must show unfairness as a demonstrable reality, not just speculation. (*People v. Perkins* (1986) 184 Cal.App.3d 583, 589 [229 Cal.Rptr. 219].)

(*In re Carlos M.*, *supra*, at p. 386.)

The ALJ made the following findings on this issue:

> 8. Once outside, Drohan went to Det. Danowitz's vehicle and sat inside. Det. Danowitz asked him to write a statement describing the incident. Ofcr. Jones contacted Romero, identified himself, and explained the violation. Because there were other patrons inside the Licensed Premises, Ofcr. Jones escorted Romero outside. Drohan, accompanied by Det. Danowitz, exited the vehicle and joined Ofcr. Jones and Romero.
>
> 9. Ofcr. Jones asked Drohan if Romero was the person who sold him the beer. Drohan said that she was and pointed to her. Drohan and Romero were facing each other, approximately four feet apart at the time. A photo of the two of them was taken (exhibit 4), after which Romero was cited.

(Findings of Fact, ¶¶ 8-9.) Based on these findings, the ALJ reached the following conclusions:

> 6. With respect to rule 141(b)(5), the Respondents argued that that [*sic*] the identification was overly suggestive on the basis that Romero was brought outside, with a number of officers around her, before Drohan was brought over. The Respondents further argued that the form of the question used in the identification was overly suggestive. These arguments are rejected. There is nothing which prohibits a clerk from being taken outside for the purposes of conducting a face-to-face identification. Indeed, the court of appeal has endorsed such a procedure.[fn.] Additionally, there is no evidence that Drohan was led (or misled) into identifying anyone. Indeed, by contacting Romero first and explaining the violation to her, Ofcr. Jones endured that Romero would be aware that she was being identified and why. Ofcr. Jones then asked Drohan if this was the person who sold him the beer—a rather basic yes or no question. Had Romero not been the clerk in question, Drohan could have simply said so. (Finding of Fact ¶ 9.)

(Conclusions of Law, ¶ 6.)

The decoy's testimony about the face-to-face identification was as follows:

[MS. CASEY]

Q At some point did you see the clerk who had sold you the beer?

A Yes.

Q And where was she?

A She was outside with the officer.

Q Which officer?

A Officer Jones.

Q How was it that she came to come outside with the officer?

A The officer asked her to step out once the sale was made.

Q So she's outside of the 7-Eleven?

A She is.

Q And where are you at this point?

A I'm still in the police vehicle.

Q At some point did you exit the vehicle?

A I did.

Q When you exited the vehicle, where did you go?

A I went and met with Officer Jones and the store clerk outside.

Q When you went and met with Officer Jones and the store clerk, how far away were you standing from the store clerk?

A Less than four feet.

Q Were you looking at her?

A I was.

Q Was she looking at you?

A Yes.

Q And were you asked by Officer Jones who sold you the alcohol?

A Yes.

Q And what did you do?

A I pointed at her and said, “She did.”

Q And after you pointed at the clerk and said “She did,” what happened next?

A The officer asked me to get close to her and look at the camera for a picture with her and the alcohol.

(RT at pp. 15-16.) Officer Jones’ testimony corroborates the decoy’s testimony in all respects. (*Id.* at pp. 49-53, 73.)

At the administrative hearing, during closing argument, counsel for appellants argued the face-to-face identification transpired differently than the way it was articulated in the testimonies of the decoy and Officer Jones:

> [MR. JAMIESON]
>
> While the argument of the Department is that the face-to-face identification took place, went in the fashion it was just described, which was, “Who sold you the alcohol? And then the decoy pointed,

> unfortunately that's not what occurred here. What we heard today by testimony of this officer as well as Mr. Drohan is the following: "I pointed to Romero" – this is the officer speaking.
>
> "I pointed to Romero and asked Drohan if she was the employee who sold him the alcohol. Drohan responded yes."
>
> So it didn't happen where the officer said, "who sold you the alcohol?" And then the decoy pointed the clerk out. It happened exactly the wrong way and that was the officer had already identified the clerk . . .

(RT at p. 83.) Appellants' version of the face-to-face identification is based, not on the testimony of the decoy and Officer Jones, but on an exchange which occurred during cross-examination of the decoy. At that cross, appellants' counsel read a portion of the police report where Officer Jones had written that he pointed to the clerk and asked the decoy if she was the employee who sold him the alcohol. The decoy was then asked if he remembered reading this statement in preparation for his testimony, and he replied "I do recall that." (RT at pp. 39-40.) The decoy was not asked, however, if that portion of the police report was true.

Nothing in the record suggests that the identification was erroneous, that the decoy was in any way pressured to misidentify the seller, or that the identification was unduly suggestive. We find the face-to-face identification fully complies with rule 141(b)(5).

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.